IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-7469

DONALD HENRY GASKINS,

Petitioner,

v.

KENNETH D. MCKELLAR, Warden, South Carolina Department of Corrections, and the Attorney General of South Carolina,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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I. The trial court's instructions regarding reasonable doubt impermissibly lessened the state's burden of proof in violation of the Due Process Clause of the Fourteenth Amendment.

A. Scope of review.

First, respondents appear to suggest that the general principles enunciated in Cupp v. Naughten, 414 U.S. 141 (1973), mandate a more deferential form of review of the jury instructions challenged in this habeas proceeding than was true in Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328 (1990), since Cage was decided on direct appeal. Brief in opposition at 9-10. Petitioner submits that this argument misunderstands Cupp v. Naughten. Cupp does remind federal habeas courts that their inquiry is limited to whether, considered in the context of the whole record, a challenged jury instruction "violated some right which was guaranteed to the defendant by the Fourteenth Amendment." 414 U.S. at 146. But due process is undeniably violated whenever a trial court's instructions on reasonable doubt, taken as a whole, fail to convey the meaning of that concept. Cage v. Louisiana.[1] That being so, relief is mandated in such cases, whether the error is first identified on direct appeal or on federal habeas corpus review.

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[1]In this connection, it should be recalled that one of the reasons why the Court found the erroneous instruction in Cupp v. Naughten did not rise to the level of a federal constitutional violation was precisely that the trial judge fully and correctly instructed the jury on the state's burden of proving the defendant's guilt beyond a reasonable doubt. 414 U.S. at 143, 147-49.

Indeed, this Court has recognized that a failure to instruct on reasonable doubt is among the relatively few constitutional errors which can never be disregarded as harmless. Jackson v. Virginia, 443 U.S. 307, 320 n. 14 (1979); Arizona v. Fulminante, No. 89-839, slip op. at 7 (U.S. March 26, 1991) (White, J., dissenting in part). It is "an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon proof . . . beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. at 316. When a habeas petitioner establishes that such an "essential of . . . due process" was denied at his trial, he has made the requisite showing of an error which "by itself so infected the entire trial that the resulting conviction violated due process." Cupp v. Naughten, 414 U.S. at 147. Petitioner has made virtually the identical showing here as led the Court to reverse the conviction in Cage v. Louisiana, and the Due Process Clause of the Fourteenth Amendment likewise entitles him to relief.

Respondents' reliance on Boyde v. California, ___ U.S. ___, 110 S.Ct. 1190 (1990), is misplaced. Boyde held that where an instruction is ambiguous, the party seeking reversal on the grounds of the instruction's alleged unconstitutionality must establish a reasonable likelihood that a reasonable jury would actually have resolved the instruction's ambiguity in an unconstitutional manner. Here, as in Cage, the challenged instructions are not ambiguous, but simply wrong. In almost identical ways, the instructions in

Cage and in this case repeatedly and consistently minimized the degree of certainty required for conviction. Respondents have stressed the trial judge's reiteration of the term "reasonable doubt," and of the presumption of innocence--all features of the Cage instructions as well--but have pointed to no portion of the charge which tended to correct the judge's misdefinitions of the reasonable doubt standard, or which rendered the misleading reasonable doubt instructions merely "ambiguous."

In this connection, it should be kept in mind that the stringency of the reasonable doubt standard does not involve a mere "shading[] of meaning." Boyde v. California, 110 S.Ct. at 1198. Rather, the precise degree of certainty which the rule of reasonable doubt embodies is the very content of the constitutional guarantee itself. To insist on this degree of certainty, as the Court did in Cage, is not "technical hairsplitting," id., but an indispensable requirement of due process of law.

B. The merits of the Winship/Cage claim.

Respondents' attempt to distinguish Cage on the merits calls for little comment. Respondents emphasize that the challenged terms in this case were juxtaposed to modifiers such as "whimsical," "imaginary," and "weak and slight," Brief in Opposition at 16-17, but fail to acknowledge that the same was true of the instructions in Cage. Respondents also insist that Cage is distinguishable and that the instruction in this case was a less restrictive definition of reasonable doubt than that used in Cage. Brief in Opposition at 18-19. Respondents fail to undertake any

actual comparison of the instructions in the two cases, however, and provide nothing to support for their conclusory assertions that the instructions are distinguishable.[2]

C. Retroactivity.

Finally, respondents attempt to create the appearance of a retroactivity question by characterizing petitioner's claim as being that "the mere use of the words 'substantial,' 'strong,' or 'serious' alone may require reversal." Brief in Opposition at 20. Petitioner has, of course, advanced no such argument. His position is simply that In re Winship, 397 U.S. 358 (1970), obligates a criminal trial judge to instruct the jury concerning the state's burden of proving guilt beyond a reasonable doubt, and that the instructions used for this purpose must fairly convey the protection which the reasonable doubt standard affords. Respondents' effort to recast this straightforward and noncontroversial legal proposition into an effort to create a "per se" rule of reversal triggered by the presence of particular forbidden words shows only the artificiality of respondents' retroactivity argument.

Moreover, the cases cited by respondents in their effort to knock down the straw man of "per se treatment," Brief in Opposition at 21, actually reveal how unusual were the misdefinitions of reasonable doubt given to the jury in Cage and in this case.

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[2]In this section of their brief, respondents cite Lord v. State, 806 P.2d 548 (Nev. 1991). Lord actually supports petitioner's position. In Lord, the Nevada Supreme Court rejected a Winship/Cage challenge to an instruction that a reasonable doubt must be "actual and substantial, not mere possibility or speculation," only because of the absence of additional modifying language such as "grave" or "moral certainty." Id., 806 P.2d at 555.

Almost every case cited, other than those from South Carolina and from the Fourth Circuit, involve single isolated instructions containing no more than the phrase "substantial doubt." Taylor v. Kentucky, 436 U.S. 478, 488 (1978) ("substantial doubt, a real doubt"); United States v. Magnano, 543 F.2d 431, 437 (2d Cir. 1976) ("substantial and not shadowy"); United States v. Christy, 444 F.2d 448, 450-51 (6th Cir. 1971) (isolated use of words "reasonable, substantial" does not constitute plain error in absence of contemporaneous objection); United States v. Gratton, 525 F.2d 1161, 1162 (7th Cir. 1975) ("substantial rather than speculative" instruction does not amount to plain error); United States v. Rodriguez, 585 F.2d 1234, 1241 (5th Cir. 1978) (same); Darnell v. Swinney, 823 F.2d 299 (9th Cir. 1987) ("actual, substantial" language insufficient to warrant habeas relief); State v. MacDonald, 571 P.2d 930 (Wash. 1977) ("substantial doubt" disapproved, but not reversible error); State v. Davis, 482 S.W.2d 486 (Mo. 1972) ("substantial doubt"); Smith v. State, 547 S.W.2d 925 (Tenn. 1977) (use of "substantial doubt" is error, but harmless). That respondents are apparently forced to rely on such obviously inapposite cases shows only that actual misdefinitions of reasonable doubt are rare, and that compliance with Winship has not posed any serious problem for the vast majority of American trial courts.

To be sure, it does appear than the supreme courts of Louisiana and South Carolina have repeatedly approved erroneous reasonable doubt instructions in the years since Winship. State v. Cage, 554 So. 2d 39, 41 (1989) ("grave uncertainty . . . actual,

substantial doubt . . . moral certainty"), rev'd, ___ U.S. ___, 111 S.Ct. 328 (1990); State v. Taylor, 410 So. 2d 224, 225 (La. 1982) (same); State v. Stramiello, 392 So. 2d 425, 429 (La. 1980) ("grave uncertainty"); Adams v. South Carolina, 464 U.S. 1023 (1983) (Marshall, J., dissenting from denial of certiorari) ("a substantial doubt, a doubt for which you can give a reason . . . a strong and well-founded doubt"); Butler v. South Carolina, 459 U.S. 932 (1982) (Marshall, J., dissenting from denial of certiorari) ("a substantial doubt for which an honest person seeking the truth can give a real reason . . . a serious or strong or well-founded doubt"). But the fact that these two state courts have on occasion failed to enforce the command of Winship in their review of jury instructions in criminal cases prior to Cage v. Louisiana surely does not establish that "a state court considering [petitioner's] claim at the time his conviction became final would [not] have felt compelled by existing precedent to conclude" that the reasonable doubt instructions in petitioner's case violated due process, Saffle v. Parks, ___ U.S. ___, 110 S.Ct. 1257, 1260 (1990), or that Cage is therefore a "new" rule of criminal procedure under Teague v. Lane, 489 U.S. 288 (1989). The mere fact that some lower courts--including, in this case, the South Carolina Supreme Court--failed correctly to apply Winship to jury instructions which by their terms violated Winship's central tenet does not mean that these courts were not "compelled" by Winship to reach the correct result. It simply means that they erred. It was to redress such federal constitutional error by state courts that Congress created

the habeas remedy. 28 U.S.C. §2241. If the existence of such wrongly-decided cases were sufficient to establish that any subsequent case which is correctly decided makes "new law" inapplicable on collateral review, federal habeas corpus review would become wholly circular, because the very existence of a recurring federal constitutional violation in the state courts would deprive the federal courts of the power to correct the error.[3]

The words which unconstitutionally burdened the reasonable doubt instructions in this case did not acquire new or different meanings in the years since petitioner's case become final on direct review. Cage simply applied this Court's "commonsense understanding," Boyde v. California, 110 S.Ct. at 1198, and the insight to be derived from any standard dictionary, to hold that when a trial court permits a conviction on proof satisfying the jury beyond a "substantial" or "well-founded" doubt, the accused has been denied the benefit of the reasonable doubt rule. Here the trial judge emphatically authorized conviction upon proof of guilt

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[3]Parenthetically, petitioner would note respondents' citation of this Court's denials of certiorari in two South Carolina direct appeals involving virtually identical reasonable doubt instructions as additional evidence that the constitutional doctrine which petitioner invokes would constitute a "new" rule under Teague. Brief in Opposition at 21, citing Adams v. South Carolina, 464 U.S. 1023 (1983) (Marshall, J., dissenting from denial of certiorari); Butler v. South Carolina, 459 U.S. 932 (1982) (same). Respondents apparently misread Teague as having effectively voided the long-established rule that "a denial of a petition for certiorari has no significance as a ruling," Parker v. Ellis, 362 U.S. 574, 576 (1959), and "does not imply approval of the decision for which review is sought or of its supporting opinion." Elgin, Joliet and E. Ry. Co. v. Gibson, 355 U.S. 897 (1957) (memorandum of Frankfurter, J.).

beyond a "substantial doubt," a doubt for which the jurors could give a reason, and a "serious or strong and well-founded doubt." The Court's holding in Cage is equally applicable to this case, and requires that habeas corpus relief be granted.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari previously filed, the Court should grant the writ and reverse the judgment of the court of appeals.

Respectfully submitted,

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April 21, 1991.

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April 22, 1991

90-7469

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: Donald Henry Gaskins v. Kenneth D. McKellar

Dear Mr. Suter:

Enclosed please find for filing, with proof of service, the original and nine (9) copies of petitioner's reply to respondents' brief in opposition in the above captioned matter.

Very truly yours,

John H. Blume

JHB/cag
Enclosure

c: Donald J. Zelenka, Esq.

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CERTIFICATE OF SERVICE BY MAIL

I do hereby certify that I have served upon the attorney for the Respondent petitioner's reply to respondents' brief in opposition to the writ of certiorari to the United States Court of Appeals for the Fourth Circuit in this action by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Donald J. Zelenka, Esq.
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This the 22nd day of April, 1991, in Columbia, South Carolina.

John H. Blume